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In the Supreme Court of the United States

OCTOBER TERM, 1957

EL PASO NATURAL GAS COMPANY AND PACIFIC NORTHWEST PIPELINE CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
ERNEST L. FOLK, III,
Attorneys,
Department of Justice, Washington 25, D. C.

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Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717f, *et seq.*

Section 7 — 3, 5, 6, 12

Section 20 (a) — 9

Shipping Act, 1916, 39 Stat. 728, 46 U. S. C. 801, *et seq.* Section 15 — 9

26, 1957.[1] The jurisdiction of this Court is invoked under the All Writs Act, 28 U. S. C. 1651 (a).

QUESTION PRESENTED

In an action under Section 7 of the Clayton Act, the United States charged that the acquisition by one natural gas pipeline company of substantially all the stock of a competing pipeline company may substantially lessen competition or tend to create a monopoly. Subsequently, the acquiring pipeline company petitioned the Federal Power Commission for authority to acquire the pipeline facilities of the other company. The district court refused to dismiss the Clayton Act proceedings, or, alternatively, to stay such proceedings pending determination of the Power Commission applications. The following question is presented:

Whether the district court acted within its powers in declining to dismiss or stay its proceedings on the stock acquisition pending Commission determination of the proposed asset acquisition.

STATUTES INVOLVED

The pertinent portions of the Clayton Act, as amended, and of the Natural Gas Act are set forth in the Appendix, *infra*.

STATEMENT

On July 22, 1957, the United States filed a complaint in the district court charging that the recent acquisi-

[1] An application for a stay was filed contemporaneously and was denied by Mr. Justice Whittaker on December 5, 1957, but without prejudice to renewal of the application if the petition for a writ of certiorari should be granted.

tion by El Paso Natural Gas Company ("El Paso") of more than 99% of the stock of Pacific Northwest Pipeline Corporation ("Pacific Northwest") violated Section 7 of the Clayton Act (15 U. S. C. 18). The complaint alleged that the effect of the acquisition, which enabled El Paso to control the interstate transmission and sale of natural gas in eleven far western states, may be substantially to lessen competition or tend to create a monopoly.

Some two weeks later, on August 7, 1957, El Paso and Pacific Northwest filed applications with the Federal Power Commission under Section 7 of the Natural Gas Act (15 U. S. C. 717f) for certificates of public convenience and necessity authorizing El Paso to acquire its subsidiary's pipeline facilities. On September 30, 1957, petitioners moved in the district court to dismiss the complaint on the grounds that the court had no jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted or, in the alternative, to stay all proceedings pending determination by the Federal Power Commission of their applications. The theory of the motion was that the filing of the applications with the Federal Power Commission gave the latter agency primary jurisdiction to pass upon the issues raised in the Clayton Act suit.

After extensive argument, the court denied the motion from the bench. The court held that the issues in the Clayton Act proceeding (involving the stock acquisition) were not the same as those in the Federal Power Commission proceeding (involving the asset

acquisition); that, under the Natural Gas Act, the Commission had no jurisdiction to decide whether the stock acquisition violated the Clayton Act, or to grant antitrust immunity to such acquisitions; and that, therefore, the "Government doesn't have any remedy in attacking * * * [the] stock transaction except right here in this court" (Tr. 55).[2] Hence, the filing of the applications with the Commission did not oust the court of its jurisdiction to decide the Clayton Act case (Pet. App. A, pp. 2–5). The court pointed out (*id.*, p. 3) that, although petitioners initially could have sought Commission approval of the asset consolidation and, if granted, might thereby have obtained antitrust immunity, they "didn't choose to proceed that way," but instead took "a calculated risk" by acquiring the stock.

ARGUMENT

The district court held that the doctrine of primary jurisdiction was not applicable to this case because (1) the issues before the court and before the Federal Power Commission are not the same, and (2) the Commission has no jurisdiction under the Natural Gas Act either to determine whether the stock acquisition violates the Clayton Act or to grant antitrust immunity to such acquisition. That decision, we submit, is clearly correct, and does not call for the exercise of this Court's extraordinary jurisdiction to review by certiorari an interlocutory order.

1. The doctrine of primary jurisdiction "comes into play" whenever disposition of a claim, "originally

[2] "Tr." refers to the Transcript of argument, October 21, 1957.

cognizable in the courts," "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body * * *." *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, 64. It reflects the "principle * * * that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference* v. *United States*, 342 U. S. 570, 574. The concept necessarily presupposes that the agency has jurisdiction to pass upon the issues that are referred to it; in no case has this Court "ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 254; cf. *Georgia* v. *Pa. R. Co.*, 324 U. S. 439, 455.

The district court correctly held that the Federal Power Commission "hasn't any jurisdiction to deal with" (Pet. App. A, p. 2; see pp. 3, 4) the question in the Clayton Act proceeding, namely, the legality of the stock acquisition.[3] Petitioners do not contend otherwise. They argue (Pet. 13, 16, 27 (footnote), 30, 32) only that the "essential" or "underlying"

[3] The relevant sections of the Natural Gas Act relate only to the acquisition of natural gas facilities, not the acquisition of stock. Thus, Section 7 (c) (15 U. S. C. 717f (c)) forbids any natural gas company to "acquire" any facilities for "the transportation or sale of natural gas" except upon a certificate of public convenience and necessity "authorizing such acts or operations."

question in the two proceedings is the same, *i. e.*, whether it is "in the public interest of the people of the territories served that there be two independently operated pipeline systems or a single integrated system," and that this question is within the Commission's primary jurisdiction.

While the above question may be the ultimate issue in the asset acquisition proceeding before the Power Commission, it is not the statutory test which the district court is to apply in determining the legality of the stock acquisition under Section 7 of the Clayton Act. Unlike the broad standard of "public convenience and necessity" in Section 7 of the Natural Gas Act,[4] the touchstone of illegality under the Clayton Act is a narrower test: whether the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly. In other words, the Clayton Act is concerned solely with the effects of an acquisition upon competition, and not the broader issue whether an asset consolidation may appear justified by "public convenience and necessity" despite its anticompetitive aspects.[5]

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[4] That section directs the Commission to approve any asset acquisition which it finds, *inter alia*, "is or will be required by the present or future public convenience and necessity." 15 U. S. C. 717f (e).

[5] Petitioners assert (Pet. 16) that the district court erred in "artificially separating" the stock from the asset acquisition. But it was Congress, and not the district court, which made that separation, by giving the Federal Power Commission jurisdiction over only asset, and not over stock, acquisitions. This distinction presumably reflects the significant practical differences between the two kinds of acquisitions. See *Allegheny Corp.* v. *Breswick & Co.*, 353 U. S. 151, 170;

As the district court pointed out (Pet. App. A, p. 4), the instant case involves only the "ordinary, usual issues in Clayton Act proceedings," which courts customarily adjudicate. Thus, the case neither "rais[es] issues of fact not within the conventional experience of judges" nor "requir[es] the exercise of administrative discretion" (*Far East* case, *supra*). Furthermore, the Power Commission has no jurisdiction to decide (nor, indeed, any special expertise with respect to) the sole question here involved (the legality of the stock acquisition under the standard of Section 7 of the Clayton Act), and the "relief which * * * [the Government] seeks [divestiture of the stock illegally acquired] is not a matter subject to the jurisdiction of the Commission." *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 455. The Commission has jurisdiction only over the acquisition of pipeline "facilities," whereas the stock acquisition necessarily resulted in El Paso's acquiring control over all the corporate activities of Pacific Northwest. Finally, we point out that the Government's complaint also raises issues with respect to the adverse effect of the stock acquisition upon competition between petitioners in the production and distribution of various oil and gas *products*[6]—a matter not within the Commission's regula-

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Cf. *Arrow-Hart & Hegeman Elec. Co.* v. *Federal trade Commission*, 291 U. S. 587.

[6] Paragraph 14 of the complaint states:

"In addition to the operation of its natural gas pipeline transmission system, defendant Pacific Northwest, directly and through its subsidiaries, is engaged in the exploration for oil, the production and refining of crude oil and the recovery and manufacture of products from natural gas, including natural

tory jurisdiction. The district court, therefore, correctly held that the doctrine of primary jurisdiction is not applicable, and that "the Clayton Act proceeding should go forward" (Pet. App., p. 4).

This case is significantly different from the *Cunard* and *Far East* cases upon which petitioners rely (Pet. 22–30). In those cases, the conduct alleged in the antitrust complaints also violated the Shipping Act of 1916, and the Federal Maritime Board had full authority to deal with such violations under that Act. In the instant case, the Power Commission has no jurisdiction to pass on the transaction challenged in the Clayton Act case (the stock acquisition) and the Natural Gas Act provides no "remedy" therefor which "supersedes the antitrust laws". *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485. Nor are the issues in the Clayton Act case "within the special competence of an administrative body." *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, 64.[7]

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gasoline, butane, propane and other refined and extracted products."

Paragraph 15 (g) lists as one of the effects of the acquisition:

"Actual and potential competition between El Paso and Pacific Northwest in the production and sale of a variety of products of the oil and gas industry, including extracted and refined products of oil and natural gas, will be eliminated."

[7] In the *Western Pacific* case, upon which petitioners also rely, this Court held that questions as to the construction and reasonableness of tariff provisions, at issue in a suit in the Court of Claims, were within the primary jurisdiction of the Interstate Commerce Commission, and that the court therefore should have referred these questions to the Commission. In the instant case, however, the question whether the effect of the stock acquisition may be "substantially to lessen competition

Unlike some other regulatory statutes which provide antitrust immunity for transactions approved by the agency (*e. g.*, Section 15, Shipping Act, 1916, 39 Stat. 728, 733, 46 U. S. C. 814; see *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485), the Natural Gas Act contains no such provision. The only specific reference to the antitrust laws in the Natural Gas Act is the provision in Section 20 (a) (15 U. S. C. 717s) authorizing the Commission to "transmit * * * evidence * * * concerning apparent violations of the Federal antitrust laws to the Attorney General * * *." In short, the Natural Gas Act contemplates that the antitrust laws remain in full force in their application to the natural gas industry. Cf. *United States* v. *Borden Co.*, 308 U. S. 188, 201. Furthermore, although Section 11 of the Clayton Act gives various agencies jurisdiction to enforce that Act with respect to the industries which they regulate, it does not authorize the Federal Power Commission to enforce the Clayton Act against members of the natural gas industry.

2. Although this Court concededly has power under the All Writs statute (28 U. S. C. 1651 (a)) to issue a common-law writ to review an interlocutory order of the character here involved (*United States Alkali Ass'n* v. *United States*, 325 U. S. 196), such writs are "drastic and extraordinary remedies" which are reserved for "really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 259–260. Petitioners have not

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or tend to create a monopoly concededly is not within the Power Commission's special jurisdiction. And, as we have pointed out in the text, that is the sole question in the Clayton Act case.

shown any serious, let alone extraordinary, circumstances which justify immediate intervention by this Court at this preliminary stage of the litigation. They point to no legally cognizable injury which they would suffer if the district court case is permitted to follow its normal course.

At the present time, there is no actual or imminent conflict between court and agency; each is adjudicating a different issue under different standards. Indeed, if, as the Government complaint charges, petitioners have violated the Clayton Act through the stock acquisition, that would be a factor for the Federal Power Commission to consider in determining whether the asset consolidation is required by the public convenience and necessity. Although petitioners contend (Pet. 21, 27, 32) that the district court is attempting to "usurp" the Commission's power to decide the public-interest question under the Natural Gas Act, the short answer is that, whatever the district court's decision may be, it cannot oust the Commission of jurisdiction to decide the asset consolidation proceeding—just as a prior decision by the Commission could not oust the district court of its jurisdiction to decide the Clayton Act case. Surely, the district court should not be required to defer deciding an alleged violation of the Clayton Act merely because of the subsequent filing of an application for agency approval of a different, albeit related, transaction—particularly where, as here, the result would be to permit petitioners to retain, perhaps for an extended period, the fruits of what the Government deems to be an illegal stock acquisition.

In short, even if the merits were more doubtful than we think them to be, we do not believe that this would be an appropriate case for this Court to grant a writ of certiorari to review the interlocutory order of the district court. We submit that "the Congressional policy against piecemeal appeals" (*Parr* v. *United States,* 351 U. S. 513, 521) outweighs the consideration upon which petitioners rely—the inconvenience (of their own making) of being involved in two proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion for leave to file the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
ERNEST L. FOLK, III,
Attorneys.

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APPENDIX

Section 7 of the Clayton Act, 38 Stat. 730, 731, as amended, 64 Stat. 1125, 15 U. S. C. 18, provides in part as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.
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> * * * * *
>
> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commisison, Federal Power Commission * * *.

Section 7 of the Natural Gas Act, 52 Stat. 824, as amended, 56 Stat. 83, 15 U. S. C. 717f, provides in part as follows:

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or exten-

sion of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *